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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 755.

WALTER K. RIEDEL,
Petitioner,

vs.

ATLAS VAN LINES, INC. and KNOWLES STORAGE & MOVING COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Walter K. Riedel, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on December 30, 1959, the enforcement of which was stayed February 2, 1960, by an order staying the issuance of the mandate.

OPINIONS BELOW.

The opinions of the United States District Court for the Western District of Missouri, Southwestern Division, dated May 7, 1959, is not reported but is set out in the printed record on pages 27 and 28. On December 30, 1959, the United States Court of Appeals for the Eighth Circuit filed an opinion reported in 272 F.2d 901, affirming the judgment of the District Court. Appellant's petition for rehearing was denied January 27, 1960; it is not reported but appears in the certified transcript attached to the record. An order staying the issuance of the mandate was entered February 2, 1960, and appears in the transcript attached to the record below.

JURISDICTIONAL STATEMENT.

The judgment sought to be reviewed herein was dated and entered December 30, 1959. A petition for rehearing was filed by petitioner and the court below entered an order dated January 27, 1960, denying the petition for rehearing. On February 2, 1960, the court below stayed its mandate for a period of thirty days for the purpose of permitting the filing of this petition for writ of certiorari.

Jurisdiction is conferred in this court by Title 28, U.S.C., Section 1254.

QUESTION PRESENTED.

Only one question of law is involved in this case:

Is a servant, employed to drive a motor vehicle, acting within the scope of his employment when he drives a borrowed automobile to obtain a part for his disabled trailer-truck?

STATEMENT OF THE CASE.

The plaintiff, Walter K. Riedel, was horribly and permanently injured when his vehicle was struck head-on by an automobile driven by James Harris (R. 2), in Vernon County, Missouri.

The defendants were (1) James Harris, the driver of the vehicle (herein called "Harris"); (2) Knowles Storage and Moving Company, a corporation (herein called "Knowles"), the employer of Harris at the time of the collision; and (3) Atlas Van Lines, Inc., a corporation (herein called "Atlas"), the lessee of a Knowles truck hauling furniture which Harris drove and which broke down in Vernon County, Missouri (R. 1), in March of 1958.

The facts are not in dispute except as to minor details. Knowles owned certain trucks. Knowles entered into a lease agreement with Atlas whereby Atlas rented these Knowles trucks (R. 11). A Knowles driver was furnished with each truck. This driver remained on the Knowles payroll. The lease agreement appears in the Record and its pertinent provisions are as follows (R. 11):

1. Atlas paid rental to Knowles for the use of each truck based upon a certain amount for each mile Atlas used the truck in hauling merchandise (R. 12.)

2. Atlas was required to use the truck exclusively in the business and service of Atlas (paragraph (b) of Lease).

3. Atlas had authority from the Interstate Commerce Commission to travel over certain routes and the equipment was to be used solely in compliance with I.C.C. rules and tariffs (paragraphs (b) and (d) of Lease).

4. Knowles maintained the vehicle, at its cost, in good condition of repair and service (paragraph (c) of Lease).

5. Knowles paid all expenses of operation including wages of the driver, taxes, repairs and other costs (paragraph (c) of the Lease).

6. Knowles agreed to indemnify and hold Atlas harmless from "any loss or damage resulting from the negligence of * * * operating personnel."

7. Knowles agreed to obtain public liability insurance with endorsements in favor of Atlas (paragraph (i) of Lease).

8. Atlas agreed that the vehicle would be operated solely and exclusively under the direction and control of Atlas.

Harris, a Knowles employee, was driving the Knowles truck near Rich Hill, Missouri (R. 21). The truck had written on the side the names of Knowles and Atlas (R. 22). There was a load of furniture on the truck (R. 22), which was being hauled for an army officer under Atlas I.C.C. authority.

Harris was an hourly employee, paid by Knowles. When his truck breaks down, he receives "lay-over" time. That is, he receives eight hours' pay for six days while waiting and then the seventh day Knowles does not pay him, but then his lay-over time continues again the eighth and successive days (R. 22).

Harris was in sole charge of the truck. In case of a breakdown, he was to have the truck repaired and get the money from his employer, Knowles. Harris had authority to order the repairs (R. 22).

The engine on the truck "went out" near Rich Hill, Missouri (R. 22). Harris drove the truck into the Tracy Brothers garage at Rich Hill.

Tracy, the garage man, examined the truck and found that it need a new shortblock (R. 20). Harris called McGuire, a Knowles executive, who approved the purchase of the new shortblock (R. 23). Tracy and Harris then drove in Tracy's pickup truck to Kansas City to obtain the new shortblock (R. 20). They bought the new shortblock in Kansas City and drove back to Rich Hill (R. 20).

The next day, which was the day of the collision, Tracy started to put the shortblock in the engine. He found that a valve seat in the head of the engine was loose (R. 20). There was no equipment in Rich Hill to repair the valve seat. Nevada, Missouri, was 14 miles away. The valve seat could be repaired there (R. 21).

Tracy testified that Harris was in a hurry to get the truck on the road because of the load of furniture belonging to the army officer in the truck (R. 13). Tracy testified that he told Harris that it would take longer to get the truck repaired if one of the mechanics had to go to Nevada for the repair of the valve seat in the head. Tracy testified on direct examination that Harris suggested he use Tracy's car to go to Nevada with the head of the engine for the repair of the valve seat. On the cross-examination Tracy testified that the suggestion was Tracy's (R. 21).

Harris testified that the trip in Tracy's car was made at Tracy's suggestion (R. 22). Tracy did not pay him or promise to pay him anything. While he was in Rich Hill he was receiving lay-over time. The longer he stayed in Rich Hill the more money Knowles would owe to him. Tracy was to receive the same amount for repair of the truck whether it got out Sunday or Monday (R. 22). Harris admitted that he was anxious to get his truck repaired and back on the road (R. 22). Harris admitted that he was in sole charge of the truck and that in case of break-down,

he was to get the truck repaired (R. 22). In any event, Harris, with Tracy's permission, took Tracy's car to drive the 14 miles to Nevada to have the valve seat in the head of the engine repaired. Knowles did not know that Harris was using Tracy's car to hurry the repairs. Knowles had never authorized Harris to borrow Tracy's car (R. 23).

McGuire, the Knowles' vice president, testified that the more tonnage hauled by Atlas, the more Knowles receives in compensation (R. 23). Harris was on the Knowles payroll at the minute of the collision, receiving "lay-over" time. While the truck was idle, Knowles nevertheless had to pay the driver this lay-over time (R. 23). He told Harris "to see that the job was done" (R. 23). McGuire knew nothing about the Harris trip from Rich Hill to Nevada.

McGuire, in an affidavit filed in support of the Atlas motion for summary judgment, stated that (R. 17): "he, McGuire, had supervision over the maintenance and repairs to said leased tractor."

While returning from Nevada to Rich Hill in the Tracy car carrying the head of the Knowles engine, Harris injured the plaintiff. Tracy saw his car as it left his garage and the next time he saw it was at the scene of the collision (R. 21).

The trial court ruled that neither Knowles nor Atlas was liable to the plaintiff. The trial court, on the day of and before the beginning of the trial, sustained a motion for summary judgment in favor of Atlas (R. 27), and at the close of all of the case sustained a motion for a directed verdict in favor of Knowles (R. 27).

The case against Harris alone was submitted to a federal jury in Joplin, Missouri, who returned a verdict in favor of plaintiff and against Harris for $85,000 (R. 28).

The plaintiff appealed from the action of the trial court in (a) sustaining a motion for a directed verdict and entering judgment in favor of Knowles, and (b) entering summary judgment in favor of Atlas and against the plaintiff (R. 29).

The issues, therefore, are:

1. Is Knowles liable to plaintiff by reason of the negligence of its employee, Harris?

2. Is Atlas liable to plaintiff by reason of the negligence of Harris?

3. Does the fact that Harris was using the Tracy car to speed the repair of the truck and the delivery of the merchandise relieve Knowles and Atlas from liability?

REASONS FOR GRANTING THE WRIT.

The trial court held that the servant, Harris, was not acting within the scope of his employment when he borrowed a passenger automobile in order to drive to a garage where he could obtain a part for his broken-down truck, and consequently, that his master would not be liable for injuries inflicted upon another (the plaintiff) while Harris was driving the borrowed automobile. This judgment was affirmed by the Court of Appeals and a rehearing on this point of law was denied.

Admittedly, the Federal Courts must look to Missouri law for the answer of this question. But the question has not been answered in Missouri. Cases apparently similar in facts and law have been decided, but they are not in point. It is on these cases that the Court of Appeals based its decision. And since no cases are reported in Missouri on the direct issue of law presented herein, petitioner urges that the Court of Appeals should have examined the gen-

eral law of agency, The Restatement, and cases from the jurisdictions where the question has been answered. As is evident from the opinion the court below did not rest its decision on anything but Missouri cases, which petitioner urges are inapplicable on their facts. For this reason petitioner submits that a writ of certiorari should issue in order that his cases and general principles of law can comprehensively be reviewed.

The agency question has been and still is the only actively disputed issue in the litigation. This question alone is the crux of the suit and since it is the only question involved, it is imperative that it be given the closest possible scrutiny. Here is the essence of the problem. The appellees in their brief to the Court of Appeals cited six Missouri cases supporting the thesis that Harris was not acting within the scope of his employment at the time the collision occurred. Of these six cases the Court of Appeals cited four as authority for their decision. In none of the four cases was the servant-tortfeasor authorized to drive any motor vehicle by his master. Herein lies the discrepancy between the law and the facts. Petitioner urges that those cases cited by the Court of Appeals are inapplicable to the instant case as the servant herein (Harris) was authorized and employed principally to operate a motor vehicle—a semi-trailer truck. When he drove another vehicle —a 1958 DeSoto—to get a part for his broken-down trailer, he was still doing the *same kind of act* for which he was employed. He subjected his master to no greater risk because he was driving a motor vehicle which had been substituted by necessity for his truck. In the Missouri cases cited by the Court of Appeals the master's risk was greatly increased because the servants operated motor vehicles when they were not authorized or employed to do that.

The four Missouri cases cited by the Court of Appeals as authority for its decision are *Oganaso* v. *Mellow*, 356 Mo. 228, 201 S.W.2d 365; *Farber* v. *Missouri Pac. Ry. Co.*, 32 Mo. App. 378, affirmed 116 Mo. 81, 22 S.W. 631, 20 L.R.A. 350; *McCaughen* v. *Missouri Pac. Ry. Co.*, Mo. App., 274 S.W. 97 and *Montana* v. *Nenert*, Mo. App., 226 S.W.2d 394. In the *Oganaso* case the employee used a car when he was not hired to use one and injury resulted to an independent contractor working on defendant-employer's property. The court denied the liability of the employer. In the *Farber* case no mention of an automobile appears in the case at all. In that case a railroad brakeman forcibly ejected plaintiff from defendant's train. There was no evidence tending to show that the *duties* of the brakeman included the act done by plaintiff. In the *McCaughen* case the employee was hired to do his job on foot or in a streetcar, not an automobile. While using an automobile he injured plaintiff. The court said the master was not liable. And in the *Montana* case the employee was instructed to set up and prepare a garage for business, not drive an automobile. Here again the court held that the master was not liable. It should be noted that in each of these cases the employee did an act that he was not hired or authorized to do, and the act which resulted in injury to another was one which materially increased the master's risk. In the instant case Harris was operating a motor vehicle when he committed a negligent act. But the risk the master ran while Harris was driving a passenger automobile was no greater than if the same collision had occurred while he was driving a semi-trailer truck, which he was expressly hired to do.

The classic case cited by petitioner to the Court of Appeals is *Rankin* v. *Western Union Telegraph Co.*, 147 Neb. 411, 23 N.W.2d 676. In that case a delivery boy who was the servant had two bicycles, one a regular bicycle and the

other a racing bicycle. He had been instructed not to use the racing bicycle in his errands for the company. He was given a message to deliver, used the racing bicycle and struck and injured the plaintiff. Judgment for the plaintiff against the master was affirmed. The Restatement of Agency (Section 239) was cited with approval in the decision, which held there was no substantial increase of risk to the master, and that the difference between the two bicycles was slight.

An even closer case cited below by petitioner is *Radoccia v. Goodrich Oil Co.*, 63 R.I. 58, 6 A.2d 746. In that case the employee of the oil company injured the plaintiffs. The employee had been using the oil company truck to make deliveries. There was another delivery to be made but it was evening and the lights on the truck would not work. The employee then borrowed his father's car which the employee had used to go to and from work. While making the delivery in his father's car and while on his way home, the employee had the accident in suit. The court upheld the verdict for the plaintiffs against the employer.

A case which goes much further than the rule here applied is *Leary* v. *Department of Labor and Industries*, 18 Wash. 2d Series 532, 140 P.2d 292. In that case Leary was employed as a gateman at Associated Builders. His duties required him to check passes, open the gate and admit traffic and keep the gate clear. The gate became blocked by an automobile of a fellow employee. Leary went out to his own private car and, while he was driving his own car back of the fellow employee's car so he could push it, he had a heart attack from which he died. The court held that the deceased was in the course of his employment at the time of his death.

CONCLUSION

Since the court below apparently overlooked the point of law concerning the increased risk element when applied to the facts, as is indicated by its opinion, petitioner submits that these inapplicable Missouri cases be thoroughly reviewed and that the petitioner's authorities be closely studied. For the reason outlined above, petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for The Eighth Circuit.

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16,264

Walter K. Riedel, Appellant, vs. Atlas Van Lines, Inc., and Knowles Storage & Moving Company, Appellees.	Appeal from the United States District Court for the Western District of Missouri.

[December 30, 1959.]

Albert Thomson (Tom J. Helms; Davis, Thomson, Van-Dyke & Fairchild were with him on the brief) for Appellant.

Glenn A. Burkart (Frank C. Mann, Frank J. Stark, and John R. Caslavka were with him on the brief) for Appellees.

Before WOODROUGH and MATTHES, Circuit Judges, and MICKELSON, District Judge.

MICKELSON, District Judge.

This action was brought by the plaintiff to recover damages for personal injuries sustained in an automobile col-

lision which occurred on March 8, 1958. The parties will be referred to as they were designated in the trial court. Jurisdiction is based upon diversity of citizenship, and the amount involved exceeds the statutory requirements.

The plaintiff, Walter K. Riedel, was severely and permanently injured when his vehicle was struck head-on by an automobile driven by one James Harris in Vernon County, Missouri.

The defendants in the action were James Harris, hereinafter called *Harris;* Knowles Storage & Moving Company, a corporation, hereinafter called *Knowles;* and Atlas Van Lines, Inc., a corporation, hereinafter called *Atlas.*

The facts are as follows: Knowles owned a tractor-trailer unit, and entered into a lease agreement (hereinafter called the lease) with Atlas, the pertinent provisions of which will be hereinafter mentioned. Harris was furnished by Knowles as the driver of the unit and was on the Knowles payroll. The lease provided that Atlas was to pay rental to Knowles for the use of the unit according to the applicable rules and regulations of Atlas, and was to use the unit exclusively in the business and service of Atlas; the unit was to be operated solely and exclusively under the direction and control of Atlas; Knowles agreed to maintain the unit at its cost in good condition of repair and service, and agreed to pay all expenses of operation, including wages of the driver, taxes, repairs and other costs.

Harris was an hourly employee, paid by Knowles. When his unit broke down he received "lay over" time; *i. e.,* he received eight hours' pay for six days while waiting, no pay for the seventh day, and the pay commenced again on the eighth day. Harris' duties as a Knowles employee were cross-country moving, loading and unloading of

household goods and furniture, driving the unit and occasionally collecting C.O.D. charges. He was in sole charge of the unit.

The day before the accident here in question, Harris was driving the unit loaded with furniture near Rich Hill, Missouri. The motor "went out" and Harris "babied" it into the Tracy Brothers garage at Rich Hill. Tracy, the garage man, examined the engine and found that it needed a new shortblock. Harris called McGuire, a Knowles executive, who authorized the installation of a new shortblock. Tracy, with Harris accompanying him solely for the ride, drove to Kansas City, where Tracy purchased a new shortblock and returned at once to Rich Hill.

The following day, being the day of the collision here involved, Tracy started to install the shortblock but found that a valve seat in the head of the engine was loose. There was no equipment in Rich Hill with which a valve seat could be repaired. Repairs of this sort had to be made in Nevada, Missouri, a town 14 miles from Rich Hill.

On direct examination Tracy testified that Harris was in a hurry to get the unit on the road, and suggested that he borrow Tracy's car and take the head to Nevada while Tracy worked on the engine. On cross-examination Tracy testified that he told Harris that if Harris had a way to Nevada, he, Tracy, could get the job done quicker. Tracy then said, "there is my automobile". Harris did not request Tracy to loan him his car. Tracy told Harris where to go in Nevada, and what to have done there.

Harris testified that the trip to Nevada in Tracy's car was made at Tracy's suggestion, and that Tracy told him where to go and what to have done; that Tracy did not pay him or promise to pay him anything for making the

trip; that while he was in Rich Hill he was receiving layover time pay from Knowles, and that the longer he stayed in Rich Hill the more money Knowles would owe him; and that Tracy was to receive the same amount for the repair of the truck whether it was finished one day or the next. He further testified that McGuire, the Knowles representative, did not tell him to participate in the repairs, did not tell him to make the trip to Nevada and did not know that he was making the trip; that he had never had any authority or instructions from Knowles to use any automobile other than the tractor-trailer unit furnished.

McGuire testified that the more tonnage hauled by Atlas the more Knowles received in compensation; that Harris was on the Knowles payroll at the time of the collision; that Harris had called him for instructions three times after the unit broke down. McGuire further testified that he told Harris, "to see that the job was done, have it done, yes"; that from the time of the breakdown until the time of the collision he was the only person who had authority as a representative of Knowles to tell Harris what to do; and that he did not authorize Harris to make the trip from Rich Hill to Nevada, and that he knew nothing about Harris making the trip until after the accident.

While Harris was returning from Nevada to Rich Hill in the Tracy automobile transporting the head of the Knowles tractor engine, the collision occurred as a result of which this suit was brought.

Prior to trial, Atlas moved for summary judgment under Rule 56, F.R.Civ.P. based upon the pleadings, plaintiff's interrogatories to Atlas and its answers thereto, the lease, affidavits of Tracy and McGuire, and the deposition of Harris. The trial court granted Atlas' motion.

The case proceeded against Harris and Knowles, and at the close of all the evidence, defendant Knowles moved for a directed verdict in its favor, which the court granted. Judgment in its favor was entered accordingly.

It is from these judgments in favor of Atlas and Knowles that the plaintiff here appeals. The case against Harris alone was submitted to the jury and a verdict in favor of the plaintiff and against Harris in the amount of $85,000 was returned.

The points presented on this appeal are (1) is Knowles liable to plaintiff by reason of the negligence of its employee Harris; and (2) is Atlas liable to plaintiff by reason of the negligence of Harris.

The plaintiff contends that Knowles is liable for the reason that Harris was its servant or employee, and at the time of the accident was acting within the scope of his employment and authority; and that the fact that Harris was using an instrumentality (the Tracy car) different from that furnished (the trailor-tractor unit) by Knowles did not relieve Knowles from liability for Harris' negligence. He further contends that Atlas had the joint right to control Harris and is therefore responsible for torts committed by Harris in the performance of his work for Atlas.

In support of these contentions, plaintiff cites several cases from jurisdictions other than from the State of Missouri. In fact, he cites no Missouri cases, and we have found none which lends supports to his position. In diversity cases, the federal courts must apply state decisional law in the finding and determining state-created rights, obligations, and liabilities. *Commissioner* v. *Stern*, 357 U.S. 39 (1958); *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). This being a diversity case, it is the substantive law of

Missouri which is controlling on the issues here raised, and we find that the courts of Missouri have declared the law of that state regarding such issues.

In the case of *McCaughen* v. *Missouri Pac. R.R. Co.*, 274 S.W. 97 (1925), decided by the St. Louis Court of Appeals, it appears that one Liese was employed by the defendant as a special officer. His duties consisted of detecting car thieves and otherwise protecting railroad property. Liese usually used a streetcar or went on foot to conduct investigations, and his employer had not authorized him to use an automobile in carrying out his duties. Without direction or knowledge of his employer, Liese used his own automobile to conduct an investigation, and during the course of its use struck and injured the plaintiff, who brought suit against Liese and his employer. The Missouri court held:

> "This case differs from the usual case involving an injury by an automobile, where proof is made that the automobile was owned by the master and was operated, at the time of the injury, by the master's regularly employed chauffeur. From such a showing the presumption arises that such chauffeur was within the scope of his employment. In the case at bar, the defendant was not the owner of the automobile. It belonged to . . . Liese, and therefore the presumption of fact that Liese was at the time within the scope of his service and employment does not arise in this case, and the onus fell upon the plaintiff to affirmatively show that Liese operated the automobile, *at the time of the accident, with the knowledge, consent, or authority—express or implied—of the defendant.*" (emphasis added).

Again, in *Oganaso* v. *Mellow*, 201 S.W.2d 365 (1947), decided by the Missouri Supreme Court, the plaintiff, a tuckpointer, was on a ladder working on defendant's build-

ing. One of the defendant's employees, one Piva, had parked his automobile nearby, but was ordered to move it by defendant's foreman, so that the plaintiff could continue his work. While in the act of moving his car, Piva backed into the ladder on which the plaintiff was working, causing his fall and injury. Plaintiff sought to hold Piva's employer responsible for his (Piva's) negligent act. The court said:

> "An employer is liable for the acts of his employee 'only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong at the time of the injury, and in respect to the very transaction out of which the injury arose.' . . .
>
> "Piva's automobile was not an instrumentality furnished by defendants for use in his employment; Piva's car was his own; he did not use the car in his employment; nor was it shown Piva had an obligation . . . as a part of the contract of hiring . . ..
>
> "It is our opinion that, when the tort was committed, Piva had temporarily suspended the performance of the duties of his employment; and was . . . acting outside of the scope of his employment at the time."

In *Montana* v. *Nenert et al.*, 226 S.W.2d 394 (1950), decided by the St. Louis Court of Appeals, a partnership operating a garage had employed one Smith to direct the work of setting up a new shop. To enable a salesman to take measurements for installation of materials at the new shop, Smith directed another employee, one Nenert, to drive the salesman to the shop in Smith's automobile. During the course of the trip the plaintiff (salesman) was injured, and brought suit against Nenert, Smith, and the two partners as the masters of Nenert and Smith. In dis-

cussing the liability of the two partners for the negligence of Nenert, the court said:

> "The automobile in question was the private property of Smith. The company had no authority over it, and Smith was given no authority, express or implied, to use it in the company's business. Such being the case, no action is maintainable against the master even though the use of the instrumentality was in furtherance of the master's business. The vicarious liability of the master for the tort of his servant should not be extended to include responsibility for injuries sustained through the unauthorized use of such an instrumentality as an automobile. . . . . Liability in such cases should be based only on consent, either express or implied. (cites *McCaughen*).
>
> ". . . (e)ven if he (Nenert) could be said to be at the time engaged on an errand for the master, no liability could be imposed on the master by reason of the negligent operation of the car, because the use of the car for such purpose was not authorized. (cites *McCaughen*). The trial court erred in failing and refusing to direct a verdict in favor of defendants (the partners) . . . ."

See also, the early Missouri case of *Farber* v. *Missouri Pac. Ry. Co.*, 22 S.W. 631 (1898).

In the instant case, Harris, at the time of the accident was an employee of Knowles, and it might even be said that he was performing an act for his employer's benefit; however, he was not acting within the scope of his employment, because under Missouri law by using Tracy's automobile without Knowles' knowledge, consent or authority, he had so deviated from the scope of his employment as to relieve Knowles from liability for his negligent acts. We therefore conclude that the trial court properly granted Knowles' motion for a directed verdict in its favor.

On the question of the liability of Atlas for the negligence of Harris, what has heretofore been said by us concerning the liability of Knowles and the cases heretofore cited are equally applicable. It is true that under the lease the tractor-trailer unit with the driver, Harris, were to be used exclusively in the business and service of Atlas, and under the direction and control of Atlas for the purposes for which the unit and the driver had been leased, i. e., the moving, loading and unloading of household goods and furniture. At the time of the accident here involved, the unit was disabled for repairs, and was not engaged in the business of Atlas, and neither was Atlas exercising any control over Harris. It was Knowles' responsibility under the lease to maintain the unit in good condition of repair and service, and Knowles was in the act of performing this obligation at the time Harris' negligent acts occurred. We think it is therefore clear that Harris' negligent acts created no liability as to Atlas. See *Stokes* v. *Four-State Broadcasters, Inc.*, 300 S.W.2d 426.

While the propriety of the trial court's action in granting Atlas' motion for summary judgment is not raised or discussed in appellant's brief, we feel constrained to express the view that the trial court properly granted such motion.

Subdivision (c) of Rule 56, F.R.Civ.P., relating to summary judgment, reads in part as follows:

> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

It is noted that there appears to be a slight variance in a few minor details between matters contained in the af-

fidavits of Tracy and McGuire and the deposition of Harris, and the testimony of these parties adduced at the trial. We deem this unimportant for the reason that the trial court had before it in support of Atlas' motion for summary judgment all of the essential facts which the court needed in arriving at its decision. Considering the showing made by Atlas in support of its motion, there was no *genuine* issue as to any *material* fact, and Atlas was entitled to summary judgment. See *Durasteel Co.* v. *Great Lakes Steel Corp.*, 205 F.2d 438 (8th Cir. 1953); *Dulansky* v. *Iowa-Illinois Gas & Electric Co.*, 191 F.2d 881 (8th Cir. 1951); *Traylor* v. *Black, Sivalls & Bryson, Inc.*, 189 F.2d 213 (8th Cir. 1951).

The judgments appealed from are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16264 - - - - September Term, 1959.
Walter K. Riedel, Appellant,

vs.

Atlas Van Lines, a corporation, and Knowles Storage & Moving Company, a corporation.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgments of the District Court appealed from in this cause be, and they are each hereby, affirmed.

December 30, 1959.

Petition for Rehearing.

The opinion of December 30, 1959, very fairly, accurately and fully sets out the facts in this case. The opinion, however, has overlooked a controlling matter of fact and law.

Tracy, the employee, was hired to drive a motor vehicle, which is what he was doing at the time of the accident. In the three Missouri cases cited, in the opinion, the employee was hired to do something other than to drive a motor vehicle. The employee was hired to go on foot or ride a streetcar (in the *McCaughen* v. *Missouri*

Pac. R. R. Co. case), go on a ladder (in the *Oganaso* v. *Mellow* case) or set up a garage (in the *Montana* v. *Nenert* case). In those cases, when the employee used a motor vehicle, he was doing an act, i. e., driving a motor vehicle, for which he had not been employed. He thus subjected his master to greater risk by driving a motor vehicle and therefore the court held the master not liable for the tort committed by the employee in the motor vehicle.

In our case, Tracy was doing (by driving), exactly what he had been employed to do. The opinion correctly states that "he was performing an act for his employer's benefit." He subjected his employer to no greater risk, since he was driving a motor vehicle which was substituted (because of repairs) for the truck.

There is, therefore, no Missouri case in point, and the court should go to the Restatement, cases from other jurisdictions which are in point, and the general law. These authorities support Appellant's position that the trial court erred.

We request a rehearing of the case.

Respectfully submitted,

ALBERT THOMSON,
TOM J. HELMS,
Attorneys for Appellant.

DAVIS, THOMSON, VANDYKE, FAIRCHILD & WALSH,
Of Counsel.

(Filed January 19, 1960.)

(Order Denying Petition of Appellant for Rehearing.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16264 - - - - September Term, 1959.

Walter K. Riedel, Appellant,

vs.

Atlas Van Lines, Inc., and Knowles Storage and Moving Company.

Appeal from the United States District Court for the Western District of Missouri.

The Petition of the appellant for a rehearing filed in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

January 27, 1960.

(Order Staying Issuance of Mandate.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16264 - - - - September Term, 1959.

Walter K. Riedel, Appellant,

vs.

Atlas Van Lines, a Corporation, and Knowles Storage and Moving Company, a Corporation.

Appeal from the United States District Court for the Western District of Missouri.

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

February 2, 1960.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 21 1960
JAMES R. [illegible]NG, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 755.

WALTER K. RIEDEL,
Petitioner,

vs.

ATLAS VAN LINES, INC., and KNOWLES STORAGE & MOVING COMPANY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW AND JURISDICTIONAL STATEMENT.

Respondents do not take issue with petitioner's reference to the opinions delivered in the courts below, nor to the jurisdictional statement.

QUESTION PRESENTED FOR REVIEW.

Is a driver, who was employed to drive a tractor-trailer unit, acting within the scope of his employment while driving an automobile owned by a garageman, who had contracted to repair the tractor, where the trip was made without the knowledge of, and therefore not under the control nor subject to the right of control of, the alleged employer?

The foregoing question differs from that contained in the petition because respondents feel that the question as phrased in the petition does not fairly and fully conform to the issue actually presented by the circumstances of the case.

STATEMENT OF THE CASE.

Respondents find it necessary to make this additional statement of the case in order to correct certain inaccuracies and omissions in the statement of petitioner.

On page 4 of the petition the statements are made that Harris, the truck driver, was to have the truck repaired in case of a breakdown and that he had authority to order the repairs. This is incorrect. In case of breakdown, Harris was to take the truck to a garage for repairs. In case of a minor repair, he had been instructed to go ahead and have it done, but in case of a major repair, such as was here involved (Supp. R. 1), Harris was instructed to call McGuire, the Knowles executive (R. 24).

On page 5 of the petition, petitioner states: "Tracy and Harris then drove in Tracy's pickup truck to Kansas City to obtain the new shortblock (R. 20). They bought the new shortblock in Kansas City and drove back to Rich

Hill (R. 20)." The inference could be drawn therefrom that Harris drove the pickup truck to Kansas City and/or bought the shortblock, neither of which statements is correct. Tracy drove the truck and purchased the shortblock (Supp. R. 2). Harris merely went along for the ride (Supp. R. 2).

At page 6 of the petition, the statement is made that McGuire told Harris "to see the job was done". Actually, McGuire's words were, "to see that the job was done, *have it done, yes*", (Partial transcript, 74). The emphasized words, added to those quoted by the petitioner, constitute the complete answer of the witness.

At page 7, petitioner poses three questions, which he denominates as the issues in the case. Actually, the sole issue is:

Was Harris, at the moment of the collision, acting within the scope of his employment?

ARGUMENT.

I.

The Petition Fails to Comply with Rule 19 of This Court, in That (a) It Contains No Statement That the Court of Appeals Has Decided an Important State Issue in a Way in Conflict with Applicable State Law, and (b) It Contains No Showing of Special and Important Reasons to Justify the Granting of the Writ.

Nowhere in the petition is the statement to be found that the Court of Appeals has decided an important state issue in a way in conflict with applicable state law.

Petitioner, at page 7, admits that the agency question in this case is governed by Missouri law. However, he takes the position that "the question has not been answered in Missouri". He attempts to distinguish four of the Missouri cases upon which the Court of Appeals relied (making no mention of the fifth case, *Stokes* v. *Four State Broadcasters, Inc.*, Mo. Sup., 300 S.W.2d 426), and urges that this Court issue the writ "in order that his (petitioner's) cases and general principles of law can comprehensively be reviewed" (Petition, page 8).

We respectfully submit that the action suggested is not a proper function of this Court in view of the statements contained in the petition.

As was pointed out by Mr. Justice Frankfurter, in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 73, 74, 99 L. Ed. 897, 901, 75 S. Ct. 614:

> "This Rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Acts of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925."

Since this case is governed solely by Missouri law, and no federal question is presented, this Court should only grant certiorari where the petition recites and shows that the decision of the Court of Appeals conflicts with applicable state law. The absence of such recital is violative of Rule 19, subsection (b). Therefore, the Court should not grant the writ.

Further, the petition fails to state special or important reasons for review.

This is required not only by Rule 19 but by several decisions of this Court. In speaking of the necessity of questions of gravity and importance incident to consideration of this Court through certiorari, Mr. Chief Justice Fuller, in *Ex parte Woods*, 143 U.S. 202, 126, 36 L. Ed. 125, 126, 12 S. Ct. 417, observed:

> "This must necessarily be so in any view, and especially when it is considered that the Circuit Courts of Appeals were created for the purpose of relieving this court of the oppressive burden of general litigation which impeded the examination and disposition of cases of public concern and delayed suitors in the pursuit of justice."

As was noted in *Rice* v. *Sioux City Cemetery*, *supra* (349 U.S. 70, 74, 99 L. Ed. 897, 901, 75 S. Ct. 614):

> "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Clearly, this case involves a matter of importance only to the litigants. Therefore, its determination should be left to the Court of Appeals.

II.

The Granting of the Writ Would Serve No Useful Purpose Because Normally This Court Defers to the Decision of the Court of Appeals in the Interpretation of Local Law.

As was stated in *Huddleston* v. *Dwyer*, 322 U.S. 232, 237, 88 L. Ed. 1246, 1249, 64 S. Ct. 1015:

> "The decisions of the highest court of a state are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."

Again, as was observed by Mr. Justice Douglas in *Palmer* v. *Hoffman*, 318 U.S. 109, 118, 87 L. Ed. 645, 652, 63 S. Ct. 477, 144 A.L.R. 719, rehearing denied 318 U.S. 800, 87 L. Ed. 1163, 63 S. Ct. 757:

> "Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error."

The doctrine is well established in other cases, such as *General Box Co.* v. *United States*, 351 U.S. 159, 165, 100 L. Ed. 1055, 1061, 76 S. Ct. 728, rehearing denied 351 U.S. 990, 100 L. Ed. 1502, 76 S. Ct. 1044; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534, 93 L. Ed. 1520, 1524, 69 S. Ct. 1233, rehearing denied 338 U.S. 839, 94 L. Ed. 513, 70 S. Ct. 33; *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 529, 530, 2 L. Ed.2d 953, 958, 78 S. Ct. 893, rehearing denied 357 U.S. 933, 2 L. Ed.2d 1375, 78 S. Ct. 1366, and the recent case of *Goett* v. *Union Carbide Corp.*, ... U.S. ....., 4 L. Ed.2d 341, 344, 80 S. Ct. .....

Both sides agree that this case is governed by local law (Petition, page 7). The Court of Appeals, in rendering its decision, necessarily interpreted local law. There being nothing unusual about the case, it would be expected that this Court defer to the decision of the Court of Appeals. Therefore, it would seem that no useful purpose would be served by granting the writ.

III.

The Decision Below Is Clearly Correct.

Petitioner insists, at page 8 of the petition, that because Harris was driving an automobile at the time of the accident, and he had originally been employed to drive a a truck, his master was subjected to no greater risk, and therefore, Harris was within the scope of employment. It

is not clear to which alleged master petitioner refers. He then attempts to distinguish four of the five cases cited by the Court of Appeals upon the sole ground that in none was the servant employed to drive a motor vehicle. His motive in failing to mention the fifth case, *Stokes* v. *Four-States Broadcasters, Inc.*, Mo. Sup., 300 S.W.2d 426, becomes apparent when that case is read, and the facts reveal that both the alleged principal and the alleged agent contemplated that an automobile be used to do the very act which the plaintiff therein urged created the agency relationship.

Be that as it may, all of the Missouri cases cited by the Court of Appeals apply the well-established test of whether, at the moment at which the controversy arises, the act then being done is one which the alleged agent was employed to do.

The duties of Harris were unequivocally stated by Mr. McGuire of Knowles to be cross-country moving, loading and unloading of household goods and furniture, driving the truck, and in some instances, collecting C.O.D. charges (Supp. R. 2). This evidence was not controverted. He was not an automobile mechanic (Supp. R. 1). He took no part in taking the pan off the motor, nor doing any of the repair work thereto (Supp. R. 1). Why? Because these were the very things which motivated him to take the tractor to Tracy Brothers Garage in the first place. Once he had done this, his only duty was to wait until the repairs were completed (Supp. R. 1).

Petitioner makes much of the fact that Harris' use of the automobile was designed to hurry the repairs to the tractor and get the load of furniture more quickly on the road, all to the benefit of Atlas and Knowles. However, as was pointed out in *Oganaso* v. *Mellow*, 356 Mo. 228, 201 S.W.2d 365, 368:

> "The fact that the employee's act was for the employer's benefit is not, in itself, determinative that the act was in the scope of the employment."

This Missouri rule was recognized by the Court of Appeals in this case (272 F.2d 901, 903).

CONCLUSION.

The petition for certiorari discloses no statement that the decision of the Court of Appeals conflicts with applicable Missouri law. Therefore, on this basis alone, it fails to come within the provisions of Rule 19 and should be denied. Moreover, even if granted, no useful purpose would be served, because the parties agree that the decision of the Court of Appeals is nothing more than an interpretation of local law, and being such, normally will be given deference by this Court. The Court of Appeals reached its decision after careful consideration of the several Missouri cases controlling the issue here involved. We suggest that the petition be denied.

Respectfully submitted,

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